

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33544

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 479
	)	
Plaintiff-Respondent,	)	Filed: May 27, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
BENJAMIN T. HINES, JR.,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Sixth Judicial District, State of Idaho, Oneida County. Hon. Don L. Harding, District Judge.

Judgment of conviction and unified sentence of five years, with a minimum period of four years, for domestic battery, affirmed; order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Benjamin T. Hines, Jr. appeals from his judgment of conviction and unified sentence of five years, with a minimum period of four years, for domestic battery. Specifically, Hines challenges the district court's order denying his motion to withdraw his guilty plea, the reasonableness of the sentence imposed, and the district court's denial of his I.C.R. 35 motion for reduction of sentence. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

A citizen informed the police of a domestic violence incident between Hines and his wife. When the police contacted Hines's wife, she informed them that Hines had choked her and punched her in the eye. The police observed bruising around Hines's wife's eye. The state charged Hines with attempted strangulation and domestic battery--third offense within fifteen

years, I.C. § 18-918(3)(c). Hines entered into a plea agreement whereby he pled guilty to domestic battery, and the state dismissed the attempted strangulation charge. The district court granted a motion by Hines's counsel to withdraw from the case. Hines filed a pro se motion to withdraw his guilty plea, claiming ineffective assistance of counsel, mental health problems and medications, illegal drug use, and an assertion of factual innocence. Due to a scheduling error, the district court held the sentencing hearing prior to ruling on Hines's motion to withdraw his guilty plea. The district court sentenced Hines to a unified term of five years, with a minimum period of confinement of four years. At a subsequent hearing on Hines's motion to withdraw his guilty plea, Hines asserted, through substitute counsel, that he was coerced to plead guilty. After reviewing a questionnaire filled out by Hines when he pled guilty, the district court ruled that Hines had not demonstrated a just reason to withdraw his guilty plea and denied Hines's motion. Hines then filed a motion for reduction of sentence pursuant I.C.R. 35, which the district court denied. Hines appeals.

## **II.**

### **ANALYSIS**

#### **A. Motion to Withdraw Guilty Plea**

Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* Also of importance is whether the motion to withdraw a plea is made before or after sentence is imposed. Idaho Criminal Rule 33(c) provides that a plea may be withdrawn after sentencing only to correct manifest injustice. The stricter standard after sentencing is justified to insure that the accused is not encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence were unexpectedly severe. *Id.* Accordingly, in cases involving a motion to withdraw a plea after sentencing, appellate review is limited to reviewing the record and determining whether the trial court abused its sound discretion in determining that no manifest injustice would occur if the defendant was prohibited from withdrawing his or her plea. *State v. Lavy*, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992).

A threshold question is whether the plea of guilty was knowingly, intelligently and voluntarily made. *State v. Rodriguez*, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990). Of course, if the plea is legally defective, relief must be granted. *Id.* Once an appellate court has made the threshold determination that the guilty plea was knowingly, intelligently and voluntarily made, in the constitutional sense, then it proceeds to determine whether any other just reason exists for withdrawal of the plea. *Id.* The motion may properly be denied if the defendant has failed to present and support a plausible reason for withdrawal of the plea, even absent prejudice to the prosecution. *State v. Akin*, 139 Idaho 160, 162, 75 P.3d 214, 216 (Ct. App. 2003).

In the present case, Hines asserts that he demonstrated that his plea was coerced. According to Hines, his mental health issues rendered his plea unknowing and involuntary. Hines relies on his statements contained in the presentence investigation report (PSI) that he suffered from attention deficit disorder and antisocial personality disorder. Hines also relies on his statement in the PSI that he was not being provided with his medication for attention deficit disorder while incarcerated during the weeks prior to pleading guilty. Hines asserts that the district court should have been aware of his mental health problems and lack of adequate medication because, during the plea colloquy, Hines informed the district court that he was not receiving medication for attention deficit disorder. Hines also appears to assert that his counsel filled out the guilty plea questionnaire. At the hearing where Hines pled guilty, however, the district court reviewed with Hines in open court the questionnaire filled out by Hines and his counsel. The district court found at that time that Hines entered his plea knowingly and voluntarily. Hines's statements in the PSI do not refute the district court's finding because the statements do not establish that any mental health problems from which Hines may have been suffering prevented him from understanding the nature of the charges, the rights he was waiving, or the consequences of pleading guilty. At the hearing on Hines's motion to withdraw his guilty plea, the district court properly relied on the questionnaire and the plea colloquy set forth in the transcript to conclude that Hines entered a knowing and voluntary guilty plea.

Hines also asserts unpersuasively that the state failed to demonstrate that it would be prejudiced if the district court allowed Hines to withdraw his guilty plea. This assertion is unavailing because a defendant's failure to present and support a plausible reason will dictate against granting withdrawal, even absent prejudice to the prosecution. *State v. Mayer*, 139 Idaho

643, 647, 84 P.3d 579, 583 (Ct. App. 2004). The only reason Hines now asserts as a basis for withdrawal of his guilty plea is that the plea was involuntary. Because the district court properly rejected that basis for withdrawal, the state was not required to prove that it would be prejudiced by the withdrawal of the plea. *See State v. Ballard*, 114 Idaho 799, 802, 761 P.2d 1151, 1154 (1988). The district court did not abuse its discretion in denying Hines's motion to withdraw his guilty plea.

## **B. Reasonableness of Sentence**

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Hines does not assert that his sentence was illegal and has not established that his sentence was a clear abuse of discretion. The PSI indicates that Hines's criminal history includes several prior felony and misdemeanor convictions, including two previous domestic violence convictions. The record also indicates that Hines has received extensive rehabilitation efforts for his drug and alcohol problems. Given Hines's past criminal record and failed attempts at rehabilitation, Hines's assertion that the district court failed to adequately consider his substance abuse problems and his desire for treatment and rehabilitative potential is unavailing. The district court did not abuse its discretion by imposing a term of incarceration.

### **C. Motion for Reduction of Sentence**

A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1997); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984).

As grounds for a reduction of his sentence under Rule 35, Hines relies on his statements of remorse made through counsel at a hearing on Hines's motion. Hines's counsel asserted that Hines was remorseful and regretted the effect his actions would have on his unborn daughter. The district court properly concluded that this "additional information" did not demonstrate that the sentence was excessive. The district court did not abuse its discretion in denying Hines's motion for reduction of sentence.

### **III. CONCLUSION**

The district court did not abuse its discretion in denying Hines's motion to withdraw his guilty plea, imposing Hines's sentence, or denying Hines's motion for reduction of sentence. We therefore affirm Hines's judgment of conviction and sentence and the district court's order denying Hines's Rule 35 motion.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**